Kejuruteraan Taipan (M) Sdn Bhd v Loh & Loh Construction Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S3–22–323 OF 2001
MOHD HISHAMUDIN J
29 NOVEMBER 2004

Civil Procedure — Security — Security for plaintiff's costs — Plaintiff wound up — Whether reason that plaintiff had been wound up alone was sufficient to compel plaintiff to furnish security for costs — Delay in application — Whether application should be granted

The plaintiff company was woundup on 26 May 2000. The plaintiff filed the present suit in April 2001. The defendant then filed an application for security of costs in January 2004. The defendant's explanation for this long delay was that since the plaintiff had been wound up, therefore the plaintiff had to apply for leave/permission of the Official Receiver first before they could proceed with the present action. The learned senior assistant registrar dismissed the defendant's application for security for costs against the plaintiff. The defendant appealed.

Held, dismissing the appeal with costs:

Since it was the defendant who was applying for security for costs, the defendant had the legal burden to justify to the court as to why they were entitled to security for costs. It was not for the plaintiff to satisfy the court as to why they should not furnish security for costs. The defendant had failed to discharge this burden. The reason given by the defendant (that the plaintiff company had been wound up and prima facie unable to pay costs) was insufficient for the court to compel the plaintiff to furnish security for costs. Moreover, there had been inordinate delay on the part of the defendant in making the present application (see paras 3–4).

[Bahasa Malaysia summary

Syarikat plaintif telah digulungkan pada 26 Mac 2000. Plaintif telah menfailkan guaman ini pada April 2001. Defendan kemudiannya menfailkan permohonan untuk jaminan kos pada Januari 2004. Penjelasan defendan berkenaan dengan kelewatan yang lama adalah semenjak plaintif digulungkan, plaintif perlu memohon untuk izin/kebenaran Pegawai Penerima terlebih dahulu sebelum mereka boleh meneruskan dengan tindakan sekarang. Penolong kanan pendaftar menolak permohonan defendan untuk jaminan kos terhadap plaintif. Defendan telah merayu.

Diputuskan, menolak rayuan dengan kos:

Apabila defendan yang menjadi pihak yang memohon untuk jaminan kos, defendan mempunyai beban perundangan untuk memberikan alasan yang kuat kepada mahkamah berkenaan dengan kenapa mereka adalah berhak kepada jaminan kos. Ianya bukan untuk plaintif untuk memuaskan hati mahkamah berkenaan dengan mengapa mereka tidak perlu menyediakan jaminan kos. Defendan telah gagal untuk melepaskan tanggungjawab ini. Alasan yang diberikan oleh defendan (berkenaan dengan syarikat plaintif telah digulungkan dan prima facie tidak mampu untuk membayar kos) adalah tidak mencukupi bagi mahkamah untuk memaksa plaintif untuk menyediakan jaminan kos. Tambahan pula, terdapat kelewatan yang terlampau di pihak defendan dalam membuat permohonan ini (lihat perenggan 4–5).]

Notes

For a case on security, plaintif company in liquidation see 2(2) *Mallal's Digest* (4th Ed, 2004 Reissue) para 2108.

Cases referred to

Sir Lindsay Parkinson & Co v Triplan Ltd [1973] 1 QB 609 (refd)
Yee Hua Holdings Sdn Bhd & Anor v Chin Yew Nam & Ors [1999] MLJU 93 (refd)

Legislation referred to

Companies Act 1965 s 351

Venu Nair (Paul Cheah & Associates) for the plaintiff.
Celine Chelladurai (Thampson & Associates) for the defendant.

Mohd Hishamudin J:

[1] This is an appeal by the defendant against the decision of the learned senior assistant registrar who had dismissed the defendant's application for security for costs against the plaintiff pursuant to s 351 of the Companies Act 1965.

[2] I have dismissed the appeal with costs. In my judgment, since it is the defendant who is applying for security for costs, therefore, the defendant has the legal burden to justify to the court as why they are entitled to security for costs. It is not for the plaintiff to satisfy the court as to why they should not furnish security for costs. In my view, the defendant has failed to discharge this burden. I hold this view because upon examining the defendant's supporting affidavit, I find that the only reason given by the defendant for the application is that the plaintiff had been wound up and therefore *prima facie* was in no financial position to satisfy the defendant as to costs in the event the plaintiff's action were to be dismissed and costs awarded to the defendant. To my mind, the reason given by the defendant (that the plaintiff company had been wound up and *prima facie* unable to pay costs) is insufficient for the court to compel the plaintiff to furnish security for costs. More must be shown to the court. I, however, do accept that as a matter of principle, by reason of the winding up order, *prima facie*, the plaintiff is unable to pay the costs — unless

evidence to contrary is given. However, it is also a principle of law that a court is not bound to order a plaintiff to furnish security for costs just because the plaintiff has been wound up and *prima facie* is unable to pay costs. The court still has a discretion, the court must consider all the circumstances of the particular case (see *Sir Lindsay Parkinson & Co v Triplan Ltd.* [1973] 1 QB 609). Indeed s 351 of the Companies Act 1965 uses the word 'the court … may' and not 'the court … must'. In the present case, the defendant has failed to show to the court the full circumstances of the case justifying an order be made to compel the plaintiff to furnish security for costs. The defendant has only shown the fact of the plaintiff having been wound up. This, as I have said, is not enough.

[3] Secondly, there has been inordinate delay on the part of the defendant in making the present application (see *Yee Hua Holdings Sdn Bhd & Anor v Chin Yew Nam & Ors* [1999] MLJU 93). The plaintiff company was wound–up on 26 May 2000. The plaintiff company filed the present suit in April 2001. Yet the present application by the defendant (that is to say, encl 21) was only filed in January 2004 — a lapse of almost three years. The defendant's explanation for this long delay is that since the plaintiff has been wound up, therefore, they (the plaintiff) have to apply for the leave/permission of the official receiver first before they could proceed with the present action; and, in the event the official receiver refuses to grant leave, then an application for security for costs would be unnecessary. I find this explanation unsatisfactory. If indeed leave of the official receiver (for the plaintiff to sue the defendant) was such an important consideration to the defendant, then, why did the defendant file the present application only in January 2004 when leave was granted by the official receiver much earlier on 22 July 2003? Why did the defendant wait until January 2004 to file the present application?

Appeal dismissed with costs.

Reported by Loo Lai Mee